

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT B. SCHEUERMAN

Claimant

VS.

LEARJET, INC.

Self-Insured Respondent

Docket No. **1,048,056**

ORDER

The self-insured respondent requests review of the May 29, 2012 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on September 21, 2012. The Director of Workers Compensation appointed Joseph Seiwert of Wichita, Kansas, to serve as Board Member Pro Tem in place of David A. Shufelt, who retired.

APPEARANCES

Melinda Young of Hutchinson, Kansas, appeared for the claimant. Dallas Rakestraw of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained a 72.65% work disability based upon a 100% wage loss and a 45.3% task loss. The ALJ also found claimant sustained a 6.6% whole body functional impairment.

Respondent contends it is entitled to a credit pursuant to K.S.A. 44-525(c) for temporary total disability benefits (TTD) paid while claimant was receiving unemployment compensation. Respondent also argues the ALJ erred in determining the nature and extent of claimant's disability.

Claimant raises these issues: (1) whether claimant was temporarily totally disabled from October 31, 2009 through December 17, 2009; (2) the nature and extent of disability; and, (3) whether Dr. Murati's task loss opinion is supported by the evidence and should be accorded equal weight as the task loss opinions of the other testifying physicians. Claimant maintains the ALJ's Award should be affirmed.

The issues for the Board to consider are:

(1) Whether claimant was entitled to TTD from October 31, 2009 through December 17, 2009, a period in which he was also receiving unemployment compensation.

(2) Whether respondent is entitled to a credit against the Award pursuant to K.S.A. 44-525(c) for its payment of TTD during the period of time set forth in issue (1).

(3) The nature and extent of claimant's disability, including functional impairment and work disability, if any, and the relative weight to be accorded Dr. Murati's task loss opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

In November 2009, Scott Scheuerman was employed by respondent as a paint technician. His job duties included prepping the airplanes for sanding, grinding and painting.

In 1995 or 1996, claimant suffered a work-related injury to his left shoulder while working for a different employer. Claimant was diagnosed with a SLAP lesion. Dr. Chris Miller performed surgery on March 21, 1996. Claimant testified that his left shoulder thereafter returned to 100 percent.

Claimant described his November 11, 2008 accident:

We was removing the bottom of an engine cowling off a jet, it takes two people. And I was on the left side, this other guy was on the right side. You put one arm under like this and with the other side literally beat this thing because they are so tight. And the thing popped loose on the other side and the guy missed it and dropped it. By reflexes, I just done like that and caught it about 35, 40 pounds (indicating), caught it right at the ground. And that's when it tore something in my shoulder.¹

¹ R.H. Trans. at 9.

Claimant experienced a sharp pain in his left shoulder which worsened as he continued working. He reported the accident to his crew chief. The crew chief referred claimant to respondent's company doctor.

At the request of respondent's attorney Dr. Daniel Prohaska, a board certified orthopedic surgeon, examined claimant on January 15, 2009. Claimant reported to Dr. Prohaska he had pain in his neck, left shoulder and arm. The doctor found claimant sustained a partial tear of the subscapularis tendon. The doctor also found claimant's left biceps tendon "does not appear to be definitely unstable."² Dr. Prohaska prescribed anti-inflammatory medicine and sent claimant for a month of physical therapy. When claimant returned to Dr. Prohaska on February 12, 2009, he was still having left shoulder complaints. On February 20, 2009, Dr. Prohaska performed arthroscopic surgery, consisting of a repair of the left subscapularis tendon tear and a left biceps tenodesis.

At a follow-up appointment on April 14, 2009, claimant told Dr. Prohaska his pain increased when the right shoulder popped while stretching in physical therapy. Dr. Prohaska performed another left shoulder surgery, consisting of an open biceps tenodesis, on April 20, 2009. Claimant attended a post-operative visit on April 28, 2009, when claimant indicated his pain had improved by 50 percent. Dr. Prohaska directed claimant to continue physical therapy and return to one-handed work.

On June 4, 2009, claimant returned for another follow-up with Dr. Prohaska. Claimant told the doctor his discomfort had decreased but that he had fallen and landed on his right elbow. Claimant was allowed to return to modified work with no lifting greater than three pounds.

On August 6, 2009, claimant was released to return to work with restrictions of no overhead work and no lifting greater than 15 pounds.

Dr. Prohaska saw claimant on September 15, 2009, due to complaints of pain in his left shoulder and neck. Dr. Prohaska found claimant had complaints of cervical pain on the left side with compression. Claimant underwent an injection into the left glenohumeral joint. Claimant was released to return to work with a restriction of no overhead work.

Claimant returned to Dr. Prohaska on October 22, 2009, and told the doctor he had a 60% improvement after the shoulder injection for approximately a month. The doctor commented claimant possibly had a shorter-than-normal biceps tendon. Claimant was returned to work with overhead work as tolerated.

² Prohaska Depo., Ex. 4 at 43.

On December 22, 2009, claimant advised Dr. Prohaska that the injection was wearing off and there was pain radiating down from the neck to the left shoulder. A trigger point injection into the left trapezius was performed on January 21, 2010.

As of March 4, 2010, claimant still had some tenderness at the proximal and distal aspects of the left trapezius. A TENS unit was prescribed. Dr. Prohaska instructed claimant to continue physical therapy for his neck and shoulder.

On April 29, 2010, claimant saw Dr. Prohaska for the last time. Claimant advised Dr. Prohaska he still had pain in the lateral aspect of his neck and trapezius. He experienced pain while doing overhead work. Dr. Prohaska diagnosed possible cervical degenerative joint disease (DJD). The doctor determined claimant's left shoulder was at maximum medical improvement and claimant was released to return to work without restrictions.

In a June 18, 2010 letter, Dr. Prohaska opined that claimant had a 3% permanent functional impairment to his left upper extremity based on the *AMA Guides*.³ A 3% upper extremity impairment converts to 2% whole body impairment. The doctor further opined claimant's neck complaints were not related to his accidental injury on November 11, 2008.

Dr. Pedro Murati, a board certified specialist in rehabilitation and physical medicine, as well as electrodiagnostic medicine, examined claimant on June 7, 2010, at the request of claimant's attorney. Claimant complained of left shoulder pain, neck pain, limited motion of the neck and a burning sensation in the neck. Dr. Murati reviewed claimant's medical records, however, he was not provided with records from 1996 and May 11, 1999, concerning claimant's previous neck and left shoulder problems.⁴

Dr. Murati performed a physical examination and diagnosed myofascial pain syndrome affecting the left shoulder girdle, extending into the cervical paraspinals; status post left open biceps tenodesis; status post left shoulder diagnostic arthroscopy; arthroscopic long head of biceps tendon tenodesis; arthroscopic chondroplasty of humeral head and debridement of degenerative labrum.

Dr. Murati imposed these permanent restrictions: in an 8-hour day claimant should not climb ladders, crawl, or perform tasks above shoulder level greater than 35 pounds for the left shoulder. Dr. Murati also restricted claimant from engaging in work more than 24 inches out from the body and from working in awkward positions of the neck. Dr. Murati anticipated that claimant would need a shoulder arthroplasty in the near future.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁴ Murati Depo. at 39-41.

Based upon the *AMA Guides*, Dr. Murati concluded claimant had a 16% left upper extremity impairment which converts to a 10% whole person impairment. Dr. Murati also found claimant had a 5% whole person impairment due to the myofascial pain syndrome affecting the cervical paraspinal muscles. These whole person impairments combine to 15% impairment to the body. However, at his deposition, Dr. Murati changed his opinion regarding claimant's left shoulder impairment from 16% to 14% to the left upper extremity, which converts to 8% whole body impairment. Accordingly, Dr. Murati's aggregate rating is 13% to the body as a whole.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Dr. Robert Barnett and concluded claimant could no longer perform 22 of the 25 tasks for an 88 percent task loss.

At the request of claimant's counsel, Dr. Robert Barnett, a vocational rehabilitation counselor, conducted a telephone interview with claimant on September 10, 2010. He prepared a list of 25 unduplicated tasks claimant performed in the 15-year period before his injury.

Dr. Paul Stein examined claimant on January 6, 2011, at the request of respondent's attorney. The doctor reviewed claimant's medical records and took a history. Claimant denied any previous injuries to his neck. Based upon his examination, Dr. Stein found that claimant did not sustain any permanent impairment to his cervical spine based upon the *AMA Guides*. However, Dr. Stein's opinion regarding cervical impairment is based on a factual error. In his January 6, 2011 narrative report, Dr. Stein states "there was no complaint of neck discomfort noted in the treatment records until 1/21/10, about 14 months from the time of injury." On the contrary, the treatment records reveal that claimant complained of neck pain on a number of occasions, including when claimant first saw Dr. Prohaska on January 15, 2009.⁵

For claimant's left shoulder, Dr. Stein found 5% impairment to the upper extremity due to loss of motion from his work-related accident on November 11, 2008. That rating converts to 3% impairment to the whole body.

Dr. Stein imposed permanent restrictions that claimant avoid lifting greater than 20 pounds with the left hand up to chest level; lifting above shoulder level with the left hand; no activities with the left hand above shoulder level; and minimal activity with his left hand more than 24 inches out from his body. Dr. Stein reviewed the list of claimant's former work tasks prepared by Mr. Steve Benjamin and concluded claimant could no longer perform 23 of the 48 tasks for a 47.9 percent task loss.

On cross examination, Dr. Stein testified:

⁵ Prohaska depo., Ex. 4 at 48.

Q. Seeing those records today, would you agree at least that as of the January 19th⁶ visit with the first visit with Dr. Prohaska, Mr. Scheuerman was reporting some symptoms in the neck.

A. Yes.⁷

Steve Benjamin, a vocational rehabilitation consultant, conducted a personal interview with claimant on February 14, 2011, at the request of respondent's attorney. Mr. Benjamin prepared a list of 48 nonduplicative work tasks claimant performed in the 15-year period before his injury.

At the regular hearing, claimant testified he was having shooting pains down the back of his neck and into his shoulder. The nagging pain was constant in his shoulder. Claimant was not working and his last day worked was April 9, 2009, when claimant was laid off by respondent.

The ALJ's Award sets out findings of fact which are adopted by the Board to the extent that they do not conflict with the Board's findings set forth above and below. The Board also agrees with and adopts the conclusions of law set forth in the ALJ's decision except as noted below.

The Board finds that claimant sustained permanent impairment to the whole person for his cervical injury, which is consistent with the testimony of claimant and Dr. Murati. Beyond that, there is no apparent reason to provide significantly more weight to the opinions of any of the three testifying medical experts and there is some reason to question the bases of the opinions of all three physicians.

However, an average of the body ratings (13%, 2%, and 3%) is 6% to the whole person and the Award is modified to that extent. The ALJ's findings regarding work disability are affirmed.

The credit requested by respondent is already built into the Award because it provides that the amounts to which claimant is entitled are "less amounts previously paid." Respondent accordingly received credit for all TTD paid in the claim.

The Board finds:

⁶ This presumably refers to Dr. Prohaska's initial office visit on January 15, 2009, which documents claimant's complaints of neck as well as left shoulder pain.

⁷ Stein Depo. at 28.

(1) Respondent's request for a K.S.A. 44-525(c) is denied because the Award already provides respondent a credit for "amounts previously paid," which includes all TTD paid.

(2) Given the finding in (1), it is unnecessary to decide whether claimant was or was not entitled to TTD during the period of time he was receiving unemployment compensation.

(3) The ALJ's Award is modified to find claimant's permanent functional impairment is 6% to the whole body. Judge Klein's findings regarding work disability are affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Thomas Klein dated May 29, 2012 should be and hereby is affirmed as modified.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

e: Melinda Young, Attorney for Claimant,
melinda@bretzpilaw.com
Dallas Rakestraw, Attorney for Respondent and its Insurance Carrier,
drakestraw@mtsqr.com
Thomas Klein, ALJ

⁸ K.S.A. 2008 Supp. 44-555c(k).